STATE OF MICHIGAN

COURT OF APPEALS

STRONG SALES, INC. d/b/a STRONG INDUSTRIAL SUPPLY, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED August 21, 2007
v	No. 266296 Muskegon Circuit Court
JIM VRIESMAN d/b/a ENTRE COMPUTER SERVICES and KEN GRIFFIN d/b/a ENTRE COMPUTER SERVICES, Defendants/Counter-Plaintiffs-Appellants.	LC No. 03-042838-CZ

Before: Bandstra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

In this action seeking damages for breach of contract, breach of express warranty, and breach of implied warranty of fitness for a particular purpose, defendants appeal as of right the trial court's judgment in favor of plaintiff. We affirm.

In 2001, plaintiff requested that defendants find a software system to replace their Smart software system, which plaintiff purchased from defendants in 1983. After investigating numerous systems and engaging in discussions about plaintiff's requirements with Todd Losee, plaintiff's president, defendants recommended DataPro software. Plaintiff purchased DataPro from defendants. Given the parties' longstanding relationship, during which they worked "very closely" together maintaining Smart since 1983 and attempting to upgrade Smart in the 1990s, plaintiff did not consider consulting with any other vendor before making this purchase. In July 2001, defendants began installing and implementing DataPro. However, in January 2003, after DataPro failed to meet plaintiff's requirements, plaintiff replaced DataPro with Profit 21 software. This suit was subsequently filed. Following a three-day bench trial, the trial court granted judgment in favor of plaintiff on its claims for breach of contract, breach of express warranty, and breach of implied warranty of fitness for a particular purpose.

Defendants claim on appeal that the trial court erred in finding that they breached the implied warranty of fitness for a particular purpose. We review a trial court's factual findings for clear error and conclusions of law de novo. *Gumma v D & T Constr Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999). A finding is clearly erroneous if we are left with a definite and firm

conviction that a mistake has been made. *AFSCME v Bank One*, 267 Mich App 281, 283; 705 NW2d 355 (2005).

Defendants, in making their argument, rely on the testimony of plaintiff's expert that bench trial Exhibit 1, a list of DataPro's capabilities compiled by defendants and given to plaintiff, contained no misrepresentations. However, that Exhibit 1 contained no misrepresentations is irrelevant to the inquiry whether defendants breached the implied warranty of fitness for a particular purpose. The relevant inquiry is whether DataPro, selected by defendants for plaintiff, was suitable for the known requirements of plaintiff. See *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 293; 616 NW2d 175 (2000) (stating that the implied warranty of fitness for a particular purpose arises when the seller knows, at the time of the sale, the particular purpose for which the goods are required and that the buyer is relying on the seller to select or furnish suitable goods). At trial, Losee testified that, before defendants recommended DataPro, he and defendants discussed extensively what plaintiff required in a software system. Losee also testified that DataPro failed to meet many of the requirements made known to defendants. Based on Losee's testimony, the trial court's finding that defendants breached the implied warranty of fitness for a particular purpose was not clearly erroneous. *Gumma, supra*.

Defendants also claim on appeal that the trial court erred in finding that Exhibit 1 created an express warranty. Defendants further argue that, even if Exhibit 1 created an express warranty, the trial court erred in finding that they breached that express warranty. An express warranty is created by a seller's affirmations or promises made with the intent that the goods will conform to the affirmations or promises. *Scott v Illinois Tool Works, Inc*, 217 Mich App 35, 42; 550 NW2d 809 (1996). As stated earlier, Exhibit 1 listed DataPro's capabilities. Defendants gave Exhibit 1 to plaintiff and it was discussed in detail between Losee and defendants before plaintiff decided to buy DataPro. Under these circumstances, we are not left with a definite and firm conviction that the trial court erred in finding that defendant presented Exhibit 1 to plaintiff with the intent that DataPro would conform to the capabilities listed in Exhibit 1. *AFSCME, supra*. We are also not left with a definite and firm conviction that the trial court erred in finding that defendants breached that express warranty. Losee provided detailed testimony regarding the many ways DataPro failed to conform to the capabilities listed in Exhibit 1. We affirm the trial court's findings that defendants breached the express warranty.

Defendants finally claim on appeal that the trial court's written judgment failed to account for the deductions from plaintiff's damages for the cost of DataPro and for equipment not yet paid for that the trial court specifically referenced in its ruling from the bench. Defendants' argument is without merit. Both during its ruling from the bench and in its written order, the trial court stated that plaintiff's damages totaled $104,601.54. The trial court took this number from Exhibit 5 to plaintiff's trial brief. To arrive at this number, plaintiff added the amounts it paid for DataPro and Profit 21 and then subtracted the amount it originally agreed to pay defendants for DataPro and the amount of the value of equipment that it had not returned to defendants. Accordingly, although these deductions were not separately identified in the trial court's written order, they previously were incorporated in the court's award of $104,601.54 in damages to plaintiff. Therefore, the trial court did not improperly calculate plaintiff's damages in its written judgment and that judgment fully comports with the court's oral opinion issued from the bench.

We affirm.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen